No. 2616

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STIMSON MILL COMPANY, a corporation, Claimant of the Tow Boat "Tillicum," her engines, boilers, tackle, apparel and furniture,

Appellant,

vs.

THE INLAND NAVIGATION COMPANY, a corporation, Claimant of the Steamer "Rosalie," her tackle, apparel and furniture,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

PETITION FOR MODIFICATION OF DECREE AND FOR REHEARING

HUGHES, McMICKEN, DOVELL & RAMSEY,
Proctors for Appellant.

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Comes now appellant and petitions Your Honors as follows:

I

That in any event the judgment and decree of the District Court be modified and that the amount of said judgment be reduced in the sum of $597.30 with

interest. This Court will doubtless recall that upon the oral argument proctors for appellant called the Court's attention to an error in the decree occurring by reason of the fact that the Court had allowed the libelant to recover not only one-half of its entire damages, but also the damages to appellant's tug and tow. This proctor for appellee frankly admitted in his answering argument, and consented to the correction of the error. It was explained at the time to the Court that the error occurred in this wise: The Court in its opinion in the case (Record, p. 197) had said:

"The damage to the 'Rosalie' is shown to be $5116.12; to the 'Tillicum' and scow $597.30, a total loss of $5713.42, which should be equally divided. *A decree may be presented for libelant in the sum of $2856.71.*"

Proctor for appellee excused the mistake by saying that in the preparation of the decree he had followed the language of the Court in its opinion without noticing the error. It was also explained to the Court that at the time of the preparation of the briefs counsel overlooked, and hence did not expressly point out, this particular error.

We assume that this Court in the interval of time elapsing after the argument before the preparation of the opinion must have likewise overlooked the above facts; for surely the Court would not intentionally affirm a judgment, without modification, which allowed one of two parties, mutually at fault, to recover not only half of its own damages, but also

the whole of its adversary's; and particularly where the proctor of the party frankly admitted the error and asked correction thereof.

II.

We shall not burden this Court with a request to reconsider the main question discussed in the briefs and oral argument, namely, whether the fault of the "Rosalie" was so great as to fully account for the collision. While feeling that this contention was well taken, we are bound to assume that it was rejected only after careful consideration by the Court. But permit us to suggest that too much consideration may have been given to the finding of the trial Court as to the amount of the damages of the "Rosalie". The fact that careful consideration was not given thereto is illustrated by the admitted error above pointed out.

It is a significant fact that little, if any, competent proof of this claim for damages was offered on behalf of the "Rosalie" in the first instance, its principal testimony being reserved for rebuttal. The testimony of three experienced shipbuilders, offered by appellant, not only pointed out that the bill for the repair of the "Rosalie" was excessive in many particulars, but that as to labor, for example, it would have been practically impossible to employ so many men upon the ship in performing the work. Two of them testified that the work required by the survey could have been done for one-fourth of the bill charged, and allowed in full by the trial Court; and

Mr. Hubbard, for many years the manager of Hall Brothers' shipyard, the oldest and most reliable on Puget Sound, testified that the work could have been done for considerably less than one-third of the bill. There could be no justification for recovery of more than the necessary cost of the repairs required by Lloyd's survey. This discrepancy is so great as to excite surprise, if not grave distrust, and we feel that if this Court will carefully examine this portion of the testimony it will further modify its judgment by reducing the amount of the damages allowed to the "Rosalie."

Respectfully submitted,

HUGHES, MCMICKEN, DOVELL & RAMSEY,
Proctors for Appellant.

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